SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-252

LAWRENCE E. BIESKI, ET AL., *Petitioners*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS and HELPERS, LOCALS 107 and 326, Unincorporated Associations Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE, *Respondents*

and

JOSEPH A. SOCKLOSKY, ET AL., Acting on Their Own Behalf and on Behalf of Approximately Eighty-One Other Drivers Presently Employed by M & G Convoy, Inc., *Intervenors*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, Lawrence E. Bieski, *et al.*, pray for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. A, *infra*, p. 1a) is not yet reported. That opinion affirmed a memorandum opinion of the United States District Court for the District of Delaware (App. B, *infra*, pp. 2a-6a) not yet reported. This memorandum opinion enforced the unreported decision (App. C, *infra*, pp. 7a-12a) by respondent Eastern Conference Automobile Transporters Joint Committee. Other related opinions (App. D, *infra*, pp. 13a-34a) are that of the Third Circuit Court of Appeals reported at 396 F.2d 32 and District Court decisions dated July 9, 1970 (App. E, *infra*, pp. 34a-39a), not yet reported, and March 2, 1973 (App. F, *infra*, pp. 40a-45a), not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1974. The jurisdiction of this Court is invoked under 29 U.S.C. § 185(a).

## QUESTIONS PRESENTED

1. Is the duty of fair representation applicable to the union representatives of a Teamster Joint Committee?

2. If so, was that duty breached so that the Joint Committee's decision must be set aside?

3. May a decision of the Joint Committee be overruled because of an absence of procedural due process?

## STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a) (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as de-

fined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

## STATEMENT

This case concerns seniority rights under a collective bargaining contract. There are two companies involved: Eastern Automobile Forwarding Company, Inc. (Eastern), and M & G Convoy, Inc. (M & G), both of whom hauled Chrysler Corporation automobiles from Newark, Delaware. In January 1964, Eastern sold its real estate and all of its operating equipment to M & G and went out of business. Subsequent to the sale, all cars formerly transported by Eastern were handled by M & G.

Petitioners were formerly employed as truck drivers by Eastern. They, and also the drivers at M & G, were represented in 1964 by Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 107). The union and both Eastern and M & G were parties to the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement).

The obvious controversy that developed was whether the Agreement required that the Eastern drivers hired by M & G receive credit for their years of employment at Eastern and thus be integrated in a new M & G seniority board ("dovetailing"), or receive no recognition for this service (and placed at "the bottom of the board"). M & G opposed dovetailing because it would boost the cost of fringe benefits, since such contract provisions as pension and vacation benefits are based on years of employment. The employees were antagon-

ists, not only because layoffs would be based on seniority, but because a driver's place on the board determines the nature of the daily job assignment and whether or not it is a profitable job.[1]

The Agreement provided that in the event of an absorption or merger the seniority of the employees affected would be determined by the employer and the unions involved, and if no agreement could be reached, the grievance procedure would be utilized. Under the grievance machinery, it was provided that if disputes could not be settled at the local level between union representatives and the company, the matter would go before the Joint Committee. This Committee was made up of equal numbers of unions and employers who were parties to the multi-employer, multi-union understanding, and a decision by a majority was declared "final and binding on all the parties involved". There was also a provision for arbitration if the Joint Committee deadlocked.

At the 1964 hearing before the Joint Committee, Local 107 took a neutral position. The Joint Committee ruled there was no absorption or merger and, there-

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[1] In 1964 at the time of the sale, there were 40 active Eastern drivers and 50 active M & G employees. As was noted in *Price* v. *Int'l. Brotherhood of Teamsters, Etc.*, 457 F. 2d 605, 607 (C.A. 3, 1973):

> Whether an employee is placed at the bottom of the seniority list or "dovetailed" into it is important to over-the-road drivers in establishing the order of job selection. Different runs take place at different hours and on different days. While some jobs may give a man a semblance of a nine-to-five day, others require working at odd hours and on an irregular pattern. Of equal importance, the different runs often draw different schedules of pay. Men lower on the list may not approximate the income of men near the top. Finally, those at the bottom of the list may have no regular jobs at all. They are the members of the "extra board" whose income will vary and depend on the amount of traffic the trucking firm carries.

fore, M & G had no duty to recognize the seniority requests of the former Eastern drivers. This holding was affirmed by the District Court in an unreported decision but reversed by the Third Circuit (App. D, *infra,* pp. 13a-34a). The Court of Appeals held that the hearing procedure before the Joint Committee was plainly inadequate and that the Joint Committee's decision that there was no absorption or merger was plainly unreasonable. (*Id.*, at pp. 25a-30a). The Court then referred the matter back to the Joint Committee.

The second Joint Committee hearing was held on July 17, 1968.[2] The Joint Committee again declared there was no absorption or merger, and the District Court reversed (App. E, *infra,* pp. 34a-39a), wondering whether "the Joint Committee misinterpreted the Court of Appeals' decision or attempted to avoid it". (*Id.,* at p. 38a).

The Joint Committee delayed holding another hearing until January 13, 1971, and when this decision issued, it, too, was reversed by the District Court (App. F, *infra,* 40a-45a).[3] The fourth hearing by the Joint Committee was held on April 10, 1973. Petitioners essentially presented their arguments for dovetailing without the assistance of Local 107, since Louis Bottone, president of the union, did not arrive until well

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[2] Local 107 continued to represent petitioners even though some time in 1967 a new local, 326, was given a charter for the Wilmington area (previously, Local 107 was the bargaining agent for employees located in Wilmington). Local 326 has remained neutral throughout, but was made a party defendant in 1973 pursuant to a motion of M & G.

[3] Though Local 107 was ostensibly supporting petitioners, counsel for the union argued before the District Court that the Joint Committee decision was valid, a position in direct conflict with that taken by petitioners.

after the luncheon recess. Bottone indicated he was not too familiar with the case; urged that there be dovetailing because it was fair; offered no rationalization or explanation in support of his proposal, though he did state he knew of instances of dovetailing as far back as 1957 or 1959; indicated he would be happy to leave the hearing immediately if he didn't have to worry about a lawsuit; and that he was opposed to damages for petitioners—at least if Local 107 had to pay. On April 20, 1973, the Joint Committee awarded bottom of the board to petitioners, thereby depriving them of credit for their years of service with Eastern (App. C, *infra*, pp. 7a-12a). This time the District Court approved the Joint Committee's decision (App. B, *infra*, pp. 2a-6a), and the ruling was affirmed by the Third Circuit (App. A, *infra*, p. 1a).

It is to be noted that at the time of the second hearing in 1964 there were 110 drivers employed at M & G—20 more than were actively working for *both* Eastern and M & G in 1964. (Of the 110, 28 were former Eastern drivers.) At the time of the 1971 hearing, there were 88 active drivers, though there was testimony that M & G had gone as high at 140 employees. On April 10, 1973, when the fourth Joint Committee hearing was held, the January 1973 seniority board indicated there were 106 drivers, *and some 55 percent* of these workers had been hired after the 1964 transaction between Eastern and M & G. (There was also testimony that M & G had 118 employees in April 1973.)

## REASONS FOR GRANTING THE WRIT

1. Given the fact that the Joint Committee's decision on petitioners' grievance ordinarily may not be reviewed on the merits by the judiciary, *General Driv-*

*ers, Warehousemen and Helpers, Local 89* v. *Riss and Co., Inc.*, 372 U.S. 517, 83 S.Ct. 789 (1963), the Court of Appeals' refusal to apply the duty of fair representation to the union members of the Joint Committee means that the Third Circuit has failed to appreciate the import of this Court's statement that this duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law". *Vaca* v. *Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912 (1967). Or, to paraphrase this Court's analysis in *Humphrey* v. *Moore*, 375 U.S. 335, 347, 84 S. Ct. 363, 370 (1964), unless the duty of fair representation is applied as a restraint to arbitrary or discriminatory conduct by the Joint Committee, the duty "would be effectively emasculated".[4]

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[4] Feller, "*Vaca* v. *Sipes:* One Year Later," 21st N.Y.U. Conf. on Labor, p. 167 (1968):

> Contrary to the assumption of the courts that have since decided cases, the court [in *Vaca*] did not say that the union was liable only if it acted in bad faith or for improper reasons. In briefing and arguing the case we emphasized heavily the language in *Humphrey* that the union should be free of any further review so long as it "took its position honestly, in good faith, and without hostile discrimination." We emphasized the Court's statement in *Huffman* that the union must be given a wide range subject to "complete good faith and honesty of purpose in the exercise of its discretion." We stayed away from the word "arbitrary" like the plague. But the Court did not. Again and again it used phrases such as "arbitrary, discriminatory, or in bad faith." [n. omitted].

See also, *Griffin* v. *Int'l. United Automobile Etc.*, 469 F.2d 181, 183 (C.A. 4, 1972) ("The repeated references in *Vaca* to 'arbitrary conduct reflected a calculated broadening of the fair representation standards."); *Zalejko* v. *Radio Corp. of America*, 236 A. 160, 163 (N.J., 1967).

Half the panel of the Committee, as the Agreement specifically provides, are union representatives.[5] These panel members are there to reach an "acceptable grievance settlement", *Humphrey* v. *Moore, supra,* 375 U.S. at 352, 84 S. Ct. at 363 (Concurring Opinion), and since they decide the employees' rights under the Agreement, they act as trustees and must be held to a standard of "good faith and fair dealing". *Trailmobile Co.* v. *Whirls,* 331 U.S. 40, 68, 67 S. Ct. 982, 996 (1947) (Dissenting Opinion). Accord, *Hughes Tool Co.* v. *NLRB,* 147 F.2d 69, 74 (C.A. 5, 1945). As was said in *Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192, 199, 65 S. Ct. 226, 230 (1944): "The use of the word 'representative' . . . plainly implies that the representative is to act on behalf of all the employees . . . it undertakes to represent." See also, *Nedd* v. *United Mine Workers of America,* 400 F.2d 103 (C. A. 3, 1968). To put it another way, since the panel has the same plenary power over union members as does the union,[6] the rationale which established the duty of fair representation, conceived in *Steele, supra,* and very much alive as *Vaca, supra,* attests, must be made to cover decisions of the Joint Committee.

After all, the law must "reflect the realities of industrial life", *Humphrey* v. *Moore, supra,* 375 U.S. at

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[5] Feller, "A General Theory of the Collective Bargaining Agreement," 61 Cal. L. Rev. 663, 837 (1973): "However great the separation between the particular employer involved and the employer representatives on the joint committee they are still employee representatives. There certainly should be no doubt that the Teamsters Union representatives who sit on the joint committees are representatives of the union, not neutrals."

[6] Decisions must be by majority vote and therefore, the union members of the panel control every decision. They are clearly holders of a monopolistic trust.

353, 84 S. Ct. at 375 (Concurring Opinion). Substance prevails over form. The Court of Appeals ignored the fact that the Joint Committee decision was nothing more than a grievance settlement and that the union members on the panel have the duty to represent the employees. Thus, the lower court's ruling conflicts with the large body of case law that holds the duty of fair representation extends to the settlement of grievances as part of the administration and enforcement of the collective bargaining agreement. *Vaca* v. *Sipes, supra,* 386 U.S. at 185, 87 S. Ct. at 914; *Conley* v. *Gibson,* 355 U.S. 41, 45, 78 S. Ct. 99, 102 (1957); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 989-990 (C.A.D.C. 1973); *Day* v. *United Automobile Aerospace and Agricultural Implement Workers of America, Local 36 of UAW,* 466 F.2d 83, 89 (C.A. 6, 1972); *Bazarte* v. *United Transportation Union,* 429 F.2d 868, 871-872 (C.A. 3, 1970); *Mandel* v. *Highway and Local Motor Freight Drivers, etc.,* 246 F. Supp. 805, 808 (D.S.D.N.Y., 1964).

Nor do practical considerations stand in the way of this approach. We are not asking that the Joint Committee system be dismantled, but simply, that these decisions, like any determination within the control of a union and the attendant possibility of a § 301 suit, be subject to the duty of fair representation. Only then will it be ensured that Joint Committees everywhere will "make an honest effort to serve the interests" of all the employees that they represent. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337, 73 S. Ct. 681, 686 (1953).

2. The Court of Appeals' decision to affirm the Joint Committee's ruling that there be no dovetailing of the seniority board was not based on relevant differences but on arbitrary distinctions not permitted under the principle in *Humphrey* v. *Moore, supra,* 375 U.S.

at 347, 84 S. Ct. at 371, that integration of seniority rights "is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption such as occurred here" [n. omitted].

A review of the record requires the conclusion that the sole basis for the decision was that the M & G drivers were employed by the absorbing company and petitioners were employed by the absorbed company. But Eastern was not insolvent or bankrupt at the time of the 1964 transaction; rather, it was a going concern with a substantial amount of business—business that was automatically transferred over to M & G. The consolidation, therefore, meant more jobs were available at M & G; why not dovetail, then? Indeed, since the 1964 sale, the record shows the work force at M & G had at least doubled, sometimes was three times what it had been in 1964, and that in 1973 *more than half* of the drivers on the M & G seniority board were hired *after* the 1964 sale. Under these circumstances, the failure to integrate the two seniority lists produced an obvious inequity—M & G drivers obtained a windfall at the expense of the Eastern employees. Kennedy, "Merging Seniority Lists, 16th Annual Meeting of National Academy of Arbitrators," BNA, p. 9 (1963)[7]

The decision by the Third Circuit also conflicts with the rule that seniority rights, which have accrued over

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[7] See also, Kahn, "Seniority Problems in Business Mergers," 8 Ind. and Lab. Rel. Rev., 361, 368 (1954-1955), quoted with approval in *Humphrey* v. *Moore, supra,* 375 U.S. 347, 84 S. Ct. at 371, at n. 10: "Such equities are most likely to be overriden when members of a numerically dominant group find in a merger an opportunity to gain in seniority status at the expense of the merged minority."

the years, may not under these circumstances be destroyed retroactively. *Elgin, J. & E Ry. Co.* v. *Burley,* 325 U.S. 711, 739, 65 S. Ct. 1282, 1297 (1945), decision after rehearing, 327 U.S. 661, 60 S. Ct. 721 (1946); cf. *Kent v. Civil Aeronautics Board,* 204 F.2d 263, 266 (C. A. 2, 1953), *cert. denied,* 346 U.S. 326, 74 S. Ct. 46 (1953) ("the paramount public interest required that due consideration be given conflicting seniority interests of both groups . . .").

Of substantial significance, too, is that by 1973 the practice in the industry when two solvent companies merged was to dovetail the seniority boards; that the 1968 decision by the Third Circuit (App. D, *infra,* pp. 23a-25a) made clear that there were numerous provisions in the Agreement that protected the seniority rights of *all* employees affected by a merger or absorption; that the lower court directed the Joint Committee to give "due attention for the scheme of this contract" (*Id.,* at p. 24a); and that the Third Circuit declared that one form or another of dovetailing would be the only decision to satisfy the stated requirement that there be a rational decision (*Id.,* at p. 30a). Therefore, the 1974 ruling by the lower court approving the decision not to dovetail conflicts with this Court's admonition that courts must refuse to enforce an interpretation of a contract when the essence of the decision is not drawn from the agreement, *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960), and also conflicts with the Third Circuit's refusal in 1974 to apply the law of the case. *United States* v. *Hoffa,* 402 F.2d 380, 387 (C.A. 7, 1968), *cert. denied,* 400 U.S. 1000, 91 S. Ct. 455 (1971); *White* v. *Murtha,* 377 F.2d 428, 431 (C.A. 5, 1967).

3. The requirement of procedural due process implicitly recognized in *Humphrey* v. *Moore, supra,*—that is, two sets of drivers battling for seniority rights and the absorbing company remaining neutral—was violated in the case at bar.

Here, the fight was not carried on in a fair way. The employer members of the panel are protecting M & G's interests and urging that it be held that petitioners be sent to the bottom of the board. The union members, though, cannot really put up a good show against the unified front of the employer agents because the union members find themselves in the impossible position of having to accommodate the clashing desires of both M & G and the Eastern drivers. Thus, in the context of unified employer opposition to dovetailing and the fact that only the vote of one union representative (plus the employer ballots) was necessary, the chances of petitioners were doomed. Essentially, then, the Eastern employees stood alone and had no chance of winning—as four decisions by the Joint Committee poignantly demonstrates. This is, very simply, a violation of procedural due process, and the Court of Appeals' imprimatur to this stacked deck runs counter to the underlying assumption in all of the Supreme Court decisions on the finality of arbitration-grievance decisions that the decision-maker will be impartial.

The chances of petitioners winning their long battle was even less likely because their union, Local 107, handled the grievance in a lackadasical fashion. The approval by the Court of Appeals of the representation given by Local 107 runs counter to the requirement that grievances not be handled in a perfunctory manner if the duty of fair representation is to be satisfied.

*Vaca* v. *Sipes, supra,* 386 U.S. at 194, 87 S. Ct. at 917; *Retana* v. *Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14,* 453 F.2d 1018, 1024 (C.A. 9, 1972); *De Arroyo* v. *Sindatico De Trabjadores Packing,* 425 F.2d 281, 283-285 (C.A. 1, 1970).

This case reveals union representation at its worst: inarticulate comments, arguments made without support or justification; no attempt to present the windfall theory or that the scheme of the Agreement required dovetailing; no thoughtful analysis of the Third's Circuit's crucial 1968 decision; the failure to supply experienced and knowledgeable representatives; no in-depth analysis of the past practice of dovetailing in the industry; opposition to damages; and the lawyers of Local 107 supporting a Joint Committee decision that petitioners were attacking. Surely, this Court will not countenance such egregious behavior.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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